SECURITIES COMMISSION A

v.

DATUK ISHAK ISMAIL

HIGH COURT MALAYA, KUALA LUMPUR B
ABDUL AZIZ ABDUL RAHIM J
[ORIGINATING SUMMONS NO: D24NCC-192-2010]
26 JULY 2010

CIVIL PROCEDURE: *Judgments and orders - Ex parte order - Setting aside - Interim order restraining defendant from dealing with proceeds of sale of shares under s. 360(2) Capital Markets and Securities Act 2007 - Absence of words in ex parte order that it shall have effect pending determination of main application - Non-filing of affidavit in support in application for ex parte order - Evidence of real risk of dissipation of assets by defendant - Credible evidence of contravention of securities laws - Whether ex parte order defective - Capital Markets and Securities Act 2007, s. 360 (1), (2) - Rules of the High Court 1980, O. 29 r. 1 (2A)* C D

This was the defendant's application to set aside an *ex parte* order obtained by the plaintiff under s. 360(2) of the Capital Markets and Securities Act 2007 ('CMSA') against him. The facts showed that the plaintiff filed an originating summons ('OS') for, *inter alia*, declarations to declare the defendant as giving false and misleading information for the purpose of s. 177 CMSA and also to declare that the defendant had carried on insider trading activities under s. 188 CMSA in relation to the sale of his holding in Kenmark Industrial Company (M) Berhad ('Kenmark') – a public listed company listed on the Kuala Lumpur Stock Exchange – for a net gain of RM6,302,283. The plaintiff also sought for various restraining orders against the defendant and for payment of penalties under s. 200(2)(a) and s. 201(6)(a) CMSA, and for an order that the defendant file an affidavit of means. Pending the determination of the OS, the plaintiff obtained the *ex parte* order restraining the defendant from dealing with the proceeds of the sale of Kenmark's shares and for the filing of the affidavit of means. That led to the defendant's setting aside application herein. E F G H I

The issues were: (1) whether the absence of the words in the *ex parte* order that "the Order shall have effect pending the determination of the originating summons" or of express words to that effect invalidated the *ex parte* order; (2) whether the *ex parte* order was a restraining order in the form of an injunction and therefore there was non-compliance with O. 29 r. 1 (2A) Rules of the High Court 1980 ('RHC'); (3) whether the plaintiff's failure to file an affidavit in support in the application for the *ex parte* order rendered it defective; (4) whether evidence of a real risk of dissipation of assets by the defendant must be shown; and (5) whether there was no credible evidence of contravention of s. 177 and s. 188 CMSA.

Held (dismissing defendant's application to set aside *ex parte* order):

(1) The absence of the said words in the *ex parte* order or of express words to that effect was not fatal to the order and did not invalidate it. From the language used in sub-s. 2 of s. 360 CMSA, it was obvious that an order made on such application was for an interim order. Also, the application and order under that sub-section could only be considered when the applicant had filed an application under sub-s. (1) of s. 360 CMSA. It followed that the requirement to include the said words or expressions to that effect was not mandatory. (para 44)

(2) The purpose of sub-ss. (1) and (2) read together as intended by the legislature was to enable the plaintiff as the regulating body to apply to court for the necessary orders under sub-s. (1) in order to arrest any contravention of the securities laws, and pending the final disposal of such an application, to apply for an interim order for the purpose of preservation of assets or proceeds obtained or avoided by the contravention. (para 45)

(3) Although the words "such order shall be expressed to have effect" were used in sub-s. (2) of s. 360 CMSA, decided case authorities had shown that the word "shall" was not mandatory in every case. It all depended on the scope and object of the statute (*DW Margaret David Wilson v. Perbadanan Kemajuan Kraftangan Malaysia*, refd). Further, the defendant

was also not prejudiced by the absence of such words or expressions. The plaintiff in its *ex parte* application made it clear that the order sought was for an interim order under sub-s. (2) of s. 360 CMSA. (paras 46 & 47)

(4) All the cases cited by the defendant were on Mareva injunction which was a common law remedy or relief and did not depend on any particular provision of statute. The present case was a clear provision of the law that entitled the plaintiff to apply for an interim order for the purpose of preservation of property or *status quo* pending final determination of an application proper under sub-s. (1) of s. 360 CMSA. Order 29 RHC did not apply in an application for an interim order under s. 360(2) CMSA, *albeit* the application was by way of an *ex parte*. The *ex parte* application under O. 29 RHC should only be made or allowed in the most urgent of cases. In all other cases, the application should be *inter partes*. Further, sub-s. (3) of s. 360 CMSA provided for the handling of *ex parte* application under sub-s. (2) of s. 360 CMSA. For that reason too, O. 29 RHC did not apply herein. (paras 52 & 53)

(5) It was a fact that the plaintiff only filed an affidavit in support of the OS and that there was no affidavit filed in support of the *ex parte* application. The non-filing of the affidavit in support of the *ex parte* application by the plaintiff did not vitiate the application or render it defective. The relief sought in the *ex parte* application was one of the same reliefs prayed for in the OS. Therefore, the plaintiff might rely on the affidavit in support of the OS to argue a case for the *ex parte* order. There was no prejudice to the defendant since the affidavit filed in the OS application had detailed the grounds on which the application was sought. (para 54)

(6) The plaintiff had no obligation to show evidence of a real risk of dissipation of assets in the application under s. 360 CMSA. The application was not for the purpose of preservation of the assets for the plaintiff's personal benefit. The application was for the preservation of the assets that were allegedly obtained in contravention of the provisions of the securities laws and if necessary for restitution to innocent parties. The application was made in the public interest to stop the wrongdoer benefitting from the wrongs committed. All that the plaintiff had to show under sub-s. (2) of s. 360 CMSA was that there

A was a contravention of the securities laws by the defendant and that the defendant made unjustified gains from it. There was also credible evidence of the defendant's contravention of s. 177 and s. 188 CMSA. (para 57)

B **(7)** At this juncture of the *ex parte* application, the court was not concerned with the merits of the plaintiff's allegation of facts. The court need only be satisfied that on the evidence in the affidavit filed in the case, there was a *prima facie* case for the *ex parte* order to be made. (para 58)

C **(8)** The CMSA and in particular s. 360 was drafted with the intention, amongst others, of protecting the investing public from unscrupulous market players and to ensure that improper gains or avoidance from any trading in securities that contravened the securities law and the stock exchange rules
D were accounted for. That was to ensure public confidence and integrity in securities. Under s. 360 CMSA, the plaintiff as the regulating body of the securities industry was given express authority to come to court and seek a variety of orders to ensure compliance with the relevant requirements of the
E securities laws and to prevent contravention at the expense of unsuspecting investing public. The plaintiff's allegations were grounded on gains obtained through the use of misleading information on corporate operations of a company and the use of insider information on the shares of the company which in
F the plaintiff's belief was in contravention of the securities laws. (para 59)

(9) The requirement for the affidavit of means was premature. The defendant had indicated that he was able and willing to
G provide security to the plaintiff to secure payment of the amount sought by the plaintiff under the CMSA in the event the plaintiff succeeded in the OS. (para 60)

[Ex parte order affirmed with variation discharging filing of affidavit of
H *means.]*

Case(s) referred to:

Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. The Attorney-General, Hong Kong
I *[1986] 1 CLJ 377; [1986] CLJ (Rep) 89 SC* ***(refd)***

DW Margaret David Wilson v. Perbadanan Kemajuan Kraftangan Malaysia [2010] 5 CLJ 921 CA ***(refd)***

European Grain & Shipping Ltd v. Compania Naviera Euro-Asia SA & Ors [1989] 1 LNS 157 HC ***(refd)***
Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd [1996] 3 CLJ 483 CA ***(refd)***

Legislation referred to:
Capital Markets and Securities Act 2007, ss. 177, 182, 184, 188(4), 200(1), (2)(a), (3), 201(6)(a), 360(1)
Courts of Judicature Act 1964, s. 17
Interpretation Acts 1948 and 1967, s. 17A
Perbadanan Kemajuan Kraftangan Malaysia Act 1979, s. 35
Rules of the High Court 1980, O. 1 r. 2(2), (3), O. 29 r. 1(2A), O. 66 r. 1
Securities Commission Act 1993, ss. 3, 15(1)(b), (c), (g), (h), (i), (m), (n), 16

For the plaintiff - Tommy Thomas; M/s Tommy Thomas
For the defendant - Gopal Sreenevasan (Tan Hock Chuan & Lau Mark Chi-Ming with him); M/s Sreenevasan Young

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Abdul Rahim J:

[1] Kenmark Industrial Company (M) Berhad (Kenmark) is a public listed company listed on the Kuala Lumpur Stock Exchange. Its primary business is as supplier of goods, including electronic goods and furniture to supermarkets internationally including the Wal-Mart Supermarket. It has factories in Malaysia and Vietnam. In Malaysia alone the company employed around 400 workers.

[2] On or about 12 May 2010, several wholly owned subsidiaries of Kenmark including Billion Dynamic Sdn Bhd and Kenmark (Labuan) were served with notice of demands by their creditors including Export-Import Bank of Malaysia for arrears of payment in the alleged sum of RM60 million.

[3] About the same period, it was alleged that the Managing Director of Kenmark had left Malaysia and could not be contacted. Also could not be contacted were the two other executive directors of Kenmark. This situation was widely reported in the main newspaper in the country.

[4] Sometime on 26 May 2010, Kenmark withdrew its stock of raw materials and at the same time EON Bank Berhad, one of the creditors, has acted under a debenture created in its favour and seized Kenmark's stocks and appointed a receiver under the debenture and also stationed a security guard at Kenmark's premises in Malaysia. A scheduled meeting of Kenmark Board's Audit Committee was also postponed because of lack of quorum since the Managing Directors and the two executive directors could not be reached; and also because of the alleged resignation of a number of senior management officials of Kenmark.

[5] Kenmark also failed to file its 4th quarterly financial statement within the time period prescribed under para. 9.22(1) of the Bursa Securities Main Market Listing Requirements' resulting in the suspension Kenmark's shares trading by the Bursa. However the suspension was later revoked and Kenmark was directed by the Bursa to appoint a special audit.

[6] Then, about and around June, Kenmark's Managing Director James Hwang Ding Kuo, issued a press statement to explain his earlier disappearance and to inform the public that he had requested a third party to acquire a substantial interest in Kenmark and together they would resolve all outstanding issues of Kenmark.

[7] As a result of all these events and developments, the price of shares of the Kenmark plummeted.

[8] The defendant is a known corporate player in the industry. Through his family trust fund managed by BHLH Trustees Sdn Bhd the defendant, up to 2 June 2010, acquired 31 million of Kenmark's shares which constitutes almost 16.83% of the company share capital. On 3 June 2010 the defendant again, through Unioncity Enterprise Ltd, a company under his control, acquired another 27,691,900 shares in Kenmark which represent about 15.53% of Kenmark share capital. Thus by the closing of the trading on the Bursa on 3 June 2010 the defendant had acquired about 57,691,900 shares of Kenmark which represents 32.36% of Kenmark's share capital. These shares were acquired at a gross price of RM3,858,353.

[9] Soon after the acquisition of Kenmark's shares, the defendant was alleged to make a number of public statements and pronouncements which were purportedly misleading to the public and contained incorrect information as to the operations of Kenmark and its prospect of recovery.

[10] On or about 7 June 2010, Kenmark announced its 4th quarterly financial statement which disclosed a loss of RM140 millions. On 8 June 2010, the Bursa suspended the trading in Kenmark's shares to enable the company to explain away the losses of RM140 millions.

[11] On or about 9 June 2010, the Bursa lifted the suspension and on the same day the defendant disposed his holdings of 27,691,900 Kenmark shares for a gross sum of RM5,299.247 and again on 11 June 2010 the defendant disposed of remaining 31 millions of his Kenmark shares for a sum of RM4,861,389.00. By the two transactions the defendant made a gross gain of RM10,160,636.

[12] The plaintiff is regulatory body established under s. 3 of the Securities Commission Act 1993 and is empowered under the Act to regulate all matters pertaining to securities and future contracts and also has powers of investigation on any breach of securities market rules. Acting on those powers, the plaintiff investigated into the affairs of Kenmark and the involvement of the defendant in it. From its investigation, the plaintiff found that the defendant has in its possession purportedly non-public price sensitive information and had made public announcement purportedly to mislead the public on the operations and prospect of Kenmark and had made a gain on it.

[13] Following the outcome of the investigation, the plaintiff has filed the originating summons in encl. 1 seeking *inter alia* declarations to declare the defendant as giving false and misleading information for the purpose of s. 177 of the Capital Market and Securities Act 2007 ("CMSA") and also to declare that the defendant has carried on insider trading in relation to the sale of his holding in Kenmark for a net gain of RM6,302,283. In the originating summons the plaintiff also seeks various restraining order against the defendant to restrain the defendant firstly from dealing the proceeds of the sale of 31 million of Kenmark's shares totalling RM4,861,389 and secondly, from dealing with the proceed of sale

of 27,691,900 of Kenmark's shares in the sum of RM5,299,247. The plaintiff also seeks an order against the defendant for the payment of penalties under s. 200(2)(a) and s. 201(6)(a) CMSA. Finally, the plaintiff also seeks an order for the defendant to file an affidavit of means.

[14] Pending the determination of the originating summons in encl. 1, the plaintiff also filed encl. 3, an application for an *ex parte* injunction to restrain the defendant from dealing with the proceeds of the sale of Kenmark's shares and for the filing of the affidavit of means. The *ex parte* order was granted to the plaintiff on 16 June 2010.

[15] The defendant now filed encl. 7 to set aside the *ex parte* order and to discharge the *ex parte* injunction obtained by the plaintiff on 16 June 2010. Mr. Tan Hock Chuan, learned counsel for the defendant cited three grounds to set aside the *ex parte* order.

[16] The first ground is that there has been non compliance with O. 29 r. 1(2A) Rules of the High Court 1980 and s. 360(2) CMSA 2007. It was argued that the plaintiff failed to set out a clear and concise statement of the facts relied on to justify the application for the *ex parte* injunction. It was also submitted that the plaintiff failed to set out any answer asserted by the defendant or thought likely to assert either to the claim in the originating summons or the claim for interlocutory relief. It is a fact that the plaintiff only filed an affidavit in support of the originating summons; there is no affidavit filed in support of the *ex parte* application. The plaintiff must have relied on the same affidavit for its *ex parte* injunction application. It was further submitted that the plaintiff failed to set out whether any previous similar *ex parte* application has been made to any other judge, and if so, the order made in that previous application. Thus, it was contended that the *ex parte* order ought to be set aside for non compliance with the said O. 29 r. 1(2A) RHC 1980. The defendant cited *Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483; [1996] 2 MLJ 605 in which the court held that O. 29 r. 1(2A) was introduced to ensure that *ex parte* injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for and that its terms must be strictly complied with.

[17] The 2nd ground by the defendant to set aside the *ex parte* injunction is that there is no evidence of a real risk of dissipation of the assets by the defendant. It was argued that this is the most important ingredient to consider in granting a Mareva injunction. Learned counsel cited *European Grain & Shipping Ltd v. Compania Naviera Euro-Asia SA & Ors* [1989] 1 LNS 157 and *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 as his authorities.

[18] The third ground raised by the defendant is that there is no credible evidence of contravention of s. 177 and s. 188 CMSA. In this case the plaintiff has alleged that the defendant had made or disseminated false or misleading information within the meaning of s. 177 CMSA and had engaged in insider trading activities within the meaning of s. 188 CMSA.

[19] In any event it was submitted by the defendant that the *ex parte* order should be restricted to the difference between the acquisition price and the disposition price which is only the sum of RM6,302,283. This has to be so, learned counsel submits, because the defendant acquired 57,691,900 shares in Kenmark for a total gross purchase consideration of RM3,858,353 and had disposed a total of 57,691,900 of the shares for a total gross sum of RM10,160,636.

[20] Learned counsel for the defendant also submitted that s. 360(2) CMSA makes it mandatory that any interim order shall be expressed to have effect pending the determination of the main application. In this case, however, the *ex parte* order of 16 June 2010 did not state that it shall have effect pending the determination of the originating summons dated 16 June 2010 (which is encl. 1).

[21] For the plaintiff, it was submitted that this is not a common law action. Mr. Tommy Thomas, the learned counsel for plaintiff, argued that the plaintiff application is grounded on a specific statutory provision for a specific statutory relief. It was further submitted that the plaintiff's prayers in encl. 2 – the originating summons – is to restrain the defendant from dealing with the profit gained from the sale of the shares in Kenmark. It was argued that the application is not for an interlocutory injunction, which is basically a common law remedy. And the *ex parte* application is not a Mareva injunction but an application to seek an interim order under a statute pending the disposal of the main action in the originating summons.

[22] In the main action, the plaintiff is seeking declaratory orders as well as a restraining order. The main action was filed pursuant to s. 360(1) CMSA. The court's orders under this subsection is made at the end of the trial of the main action. However pending the determination at the trial, the court is empowered under subsection 2 of the s. 360 CMSA to give interim order to maintain the *status quo* and to preserve assets. It was also submitted that under the same section the court may order the defendant to pay three times more the amount that the defendant got from the alleged unlawful disposal of the securities. Thus it was argued that because of this, it is proper that the defendant be asked to file affidavit of means to determine whether the defendant has the resources, in the event that the defendant is found liable after the trial of the main action, to satisfy the court's order on the amount three times the amount that he had made from the unlawful disposal of the shares. However the plaintiff conceded that the scope of the affidavit in this instant may be too wide and therefore suggested that the amount of the disclosure in the affidavit of means could be limited to the amount of only RM20 million. It was submitted that the court should take serious view of this because of the penalties provided under ss. 182 and 184 CMSA.

[23] With regard to the failure of the interim order in encl. 5 not containing the express words that 'it shall have effect pending the determination of the main application' as required under s. 360(2) which learned counsel for the defendant submitted is mandatory, Mr. Tommy Thomas for the plaintiff however argued that the reading of s. 360(1) and (2) is clear in that subsection (2) deals with an interim order and subsection (1) deals with a final order. Thus if the plaintiff comes for an interim order in encl. 5 as in this case it is understood that the interim order is to stand only until the final order can be obtained under subsection (1) of s. 360 CMSA. Therefore, it was submitted for the plaintiff that the said words are not mandatory to be expressly stated in the interim order though the word 'shall' is used in the subsection.

[24] Next learned counsel for the plaintiff submitted that O. 29 RHC 1980 does not apply in this application. He says the interim order sought by the plaintiff is not a Mareva injunction and that it is sought pursuant to an express provision under s. 360(2) CMSA for preservation of property and to maintain *status quo*. However, Mr. Tommy Thomas for the plaintiff conceded that there is still a duty for full and frank disclosure because the

application is made *ex parte*. But he argued in this instant this is not an issue because there is no allegation non material disclosure being raised by the defendant.

[25] On the issue of no evidence as to dissipation of assets raised by the defendant, learned counsel for the plaintiff argued that this is not an issue because the interim order is not a Mareva injunction.

Court's Opinions

[26] The basis of the plaintiff action against the defendant is that the defendant has, in acquiring and subsequently disposing Kenmark's shares shortly after the acquisition, contravened ss. 177 and 188 CMSA. For convenience, the two sections are produce below:

> 177. A person shall not make a statement, or disseminate information, that is false or misleading in a material particular and is likely to induce the sale or purchase of securities by other persons or is likely to have the effect of raising, lowering, maintaining or stabilizing the market price of securities if, when he makes the statement or disseminates the information:
>
> (a) He does not care whether the statement or information is true or false; or
>
> (b) He knows or ought reasonably to have known that the statement or information is false or misleading in a material particular.

And

> 188(1) A person is an "insider" if that person:
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> (a) Possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and
>
> (b) Knows or ought reasonably to know that the information is not generally available.
>
> (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates:

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(a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

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(3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tend to:

C

(a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

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(b) procure a third person to acquire, dispose of or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

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(4) A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

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(5) The Minister may make regulations in respect of any particular class, category or description of persons or any particular class, category or description of transactions, relating to securities, to whom or which this section does not apply.

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[27] The alleged acts of contravention by the defendant were explained in paras. 20 to 26 of the plaintiff's affidavit in support of the originating summons in encl. 2 affirmed by Mohd Rizal bin Mohamad @ Harun on 15 June 2010. In para. 20 of Rizal's affidavit it was shown that the defendant has, between 2 June

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2010 and 3 June 2010 acquired a total of 57,691,900 or 32.36% of Kenmark shares capital at a price of about between RM0.06 (for 27,691,900 or equivalent to 15.53% of Kenmark share capital) and RM0.058 (for 31 million shares or equivalent of RM16.83% of Kenmark share capital) for a total gross purchase

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consideration of RM3,858,353. Then in para. 22, it was deposed

that within six (6) days of the acquisition ie between 3 June 2010 to 9 June 2010 the defendant made public statements with a view to disseminating information about Kenmark to the public which the plaintiff alleged the defendant knew or had reasonable cause to know to be false.

[28] The statements which the defendant was said to have made public is exhibited in exh. R13 and R14 to Rizal's affidavit.

[29] The first statement in R13 was reported in the Star Newspaper and reads:

> (Kenmark) is a good company. I checked and there was nothing wrong with the operations. There is just some misunderstanding. What I am thinking now is how we can get the business operations restarted. I have been an investor before and this company is involved in a lot of export business. Imagine the foreign earnings it brings into Malaysia. There is also another aspect. About 400 jobs are at stake if the plant does not restart. So, I wanted to help bring the employees back to work. So, it is not about (grabbing) an opportunity but doing a social service. What is wrong with that? (word in bracket is added for emphasis).

[30] The second statement in R14 was reported in an Article in Malaysian Reserve on 7 June 2010 and it reads:

> We need to meet deadlines for export orders. We also need to get the accounts ready but we need time as the computers were stolen. We need to go get out of PN17.

[31] After these two statements, however Kenmark announced its 4th Quarter Financial Statements on 7 June 2010. The statements revealed Kenmark's losses for the 4th Financial Quarter to be approximately RM140 million. This announcement is found in exh. R15 in Rizal's affidavit. Following the announcement trading in Kenmark's shares was suspended by the Bursa Malaysia on 8 June 2010 to enable Kenmark to clarify on the losses. The Bursa's announcement as to the suspension is found in exh. R16 of Rizal's affidavit. However, the suspension was lifted the next day 9 June 2010.

[32] In para. 26 of Rizal's affidavit, it was deposed that on the same day ie 9 June 2010 as the Bursa announcement lifting the suspension of trading in Kenmark's shares, the defendant began to

divest his shareholding in Kenmark by firstly selling 27,691,900 of Kenmark's shares a total gross sum of RM5,299,247 which works out to about RM0.14 sen per share giving him a profit of about RM0.08 sen per share. And secondly, on 11 June 2010 the defendant sold off the remaining 31 million Kenmark's shares held by him for a total gross sum of RM4,861,389 which works out to about RM0.16 sen per share, giving him a profit of RM0.10.2 sen per share. The record of these transactions by the defendant is exhibited in exh. R15 of Rizal's affidavit.

[33] The total gross sum realized by the defendant from the sale of all his shareholdings in Kenmark by 11 June 2010 was RM10,160,636. Thus making a gross profit of RM6,302,283.

[34] It was also deposed in para. 27 of Rizal's affidavit that an investigation was carried out by the plaintiff at the Kenmark's Malaysian factory premises at Port Klang on 10 June 2010 and it was found that there was no on going production, as the production had halted on 27 May 2010 and had not resumed at the time of the investigation. And also, the factory machinery could not function due to loss or theft of parts. These two factors led the plaintiff to believe that the two statements by the defendant as alluded to above on the positive outlook of Kenmark resuming its operation were made with full knowledge of Kenmark state of affairs and that these two statements were false or the very least they were made without any regard whether the statements were false or true.

[35] The seriousness of the acts committed by the defendant in relation to the two statements and the disposal of Kenmark shares is reflected in punitive provisions in s. 182 and s. 188(4) CMSA where it is provided that an offence under the relevant sections is punishable, on conviction, with imprisonment for a term not exceeding ten years and a fine of not less that RM1 million ringgit. It is also to be noted that under s. 200(1), (2) and (3) CMSA the plaintiff, as the regulating body, may institute civil proceedings in court against the person who contravenes s. 177 whether or not the contravention has been proved in a prosecution and may, if it considers that it is in public interest to do so, recover from that person an amount not exceeding three (3) times the gross amount of pecuniary gain made or loss avoided by such person. In addition to that, it may also claim for a civil penalty in an

amount not exceeding one million ringgit. The amount recovered is to be used firstly to reimburse the plaintiff for all costs of the investigation and proceedings in respect of the contravention and secondly, to compensate persons who have suffered loss or damage as a result of the contravention. Almost similar provision on sanction for contravening s. 188 CMSA is provided under s. 201 of the same Act.

[36] It is also pertinent to note that under s. 15 of the Securities Commission Act 1993 (Act 498) under which the plaintiff was established, the plaintiff has a wide range of functions. Relevant to the present case are functions under paras. (b), (c), (g), (h), (i), (m) and (n) of subsection (1) of s. 15 of Act 498. Under those paragraphs it is the function of the plaintiff (i) to regulate all matters relating to securities and futures contracts; (ii) to ensure that the provisions of the securities laws are complied with; (iii) to take all reasonable measures to maintain confidence of investors in the securities and futures market by ensuring adequate protection for such investors; (iv) to promote and encourage proper conduct amongst members of the exchanges, clearing houses, central depository and all licensed persons; (v) to suppress illegal, dishonourable and improper practices in dealing in securities and trading in futures contracts, and the provision of investment advice or other services relating to securities or future contracts; (vi) to license and supervise all licenced person as may be provided for under any securities law and (vii) to promote and maintain the integrity of all licensed persons in the securities and futures industries. And under s. 16 of Act 498 the plaintiff shall have all such powers as may be necessary for or in connection with, or reasonably incidental to, the performance of its function under the securities laws. In this regard it is observed that 'securities laws' is defined under Act 498 to mean the Securities Industry Act 1983, the Securities Industry (Central Depositories) Act 1991, the Securities Commission Act 1993 and the Futures Industry Act 1993.

[37] It is also to be observed that the CMSA (ie Act 671) which came into force on 28 September 2007, is a consolidation Act. The long title to CMSA reads:

A An Act to consolidate the Securities Industry Act 1993 [Act 280] and Futures Industry Act 1993 [Act 499], to regulate and to provide for matters relating to the activities, markets and intermediaries in the capital markets, and for matters consequential and incidental thereto.

B **[38]** The term or expression 'securities laws' under the CMSA has the same meaning assigned to it in the Act 498. Since CMSA is a consolidation Act which consolidated the provisions of Securities Industry Act 1993 and the Futures Industry Act 1993, it is my view that the interpretation of the term 'securities laws' C in Act 498 ought to include a reference to CMSA as well; and by that token the function of the plaintiff as the regulating body for the securities industry under Act 498 would also include a function to ensure compliance with the provision of CMSA.

D **[39]** One of the ways by which the plaintiff ensures compliance with the securities law is to come to court and seeks certain orders under s. 360(1) (A) to (P). For easy reference the full s. 360 CMSA is produced below:

E 360(1) Where -

(a) on an application by the Commission, it appears to the court that -

(i) there is reasonable likelihood that any person will F contravene a relevant requirement;

(ii) any person has contravened a relevant requirement; or

(iii) any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such G contravention, including making restitution to any other person aggrieved by such contravention,

whether or not that person has been charged with an offence in respect of the contravention or whether or H not a contravention has been proved in a prosecution;

(b) on an application by the Commission, it appears to the Court that any person has failed or is failing to comply with any direction issued by the Commission under section 354, 355 or 356;

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(c) on an application by an exchange holding company, a stock exchange, a futures exchange or an approved clearing house, as the case may be, it appears to the court that -

(i) any person has contravened a relevant requirement; or

(ii) any person has contravened a relevant requirement and that there are steps which could be taken for remedying the contravention or mitigating the effect of such contravention; or

(d) on an application by any person aggrieved by an alleged contravention by another person of a relevant requirement, it appears to the court that -

(i) the other person has contravened the relevant requirement; and

(ii) the applicant is aggrieved by the contravention, the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:

(A) an order restraining or requiring the cessation of the contravention;

(B) an order restraining a person from dealing in securities or trading in futures contracts in respect of any class of securities or futures contracts mentioned in the order;

(C) an order declaring a futures contract to be void or voidable;

(D) an order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the court is satisfied such person is reasonably likely to dispose of or otherwise deal with;

(E) an order directing a person to dispose of any securities that are specified in the order;

(F) an order restraining the exercise of any voting or other rights attached to any securities that are specified in the order;

(G) an order restraining a person from making available, offering for subscription or purchase, or issuing an invitation to subscribe for or purchase, or allotting any securities that are specified in the order;

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(H) an order appointing a receiver of the property of a holder of a Capital Markets Services Licence or the property that is held by such holder for or on behalf of another person whether on trust or otherwise;

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(I) an order vesting securities or such other property that is specified in the order in the Commission or a trustee appointed by the court;

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(J) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;

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(K) in a case of a contravention by a person of the rules of a stock exchange, a futures exchange or an approved clearing house, an order giving directions concerning compliance with or enforcement of those rules to -

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(i) the person; and

(ii) if the person is a body corporate, the directors of the body corporate;

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(L) in a case where the person is a chief executive or director, an order removing him from office or that he be barred from becoming a chief executive, director or be involved in the management directly or indirectly, of any other public company for such period of time as may be determined by the court;

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(M) an order requiring the person, or any other person who appears to have been knowingly involved in the contravention, to take such steps as the court may direct to remedy it or to mitigate its effect including making restitution to any other person aggrieved by such contravention;

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(N) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;

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(O) where a person has refused or failed or is refusing or failing to comply with any direction issued by the Commission under section 354, 35 or 356, an order directing such person to comply with such direction that is issued by the Commission; and

(P) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection.

(2) If an application is made to a court for an order under subsection 91), the court may, if in its opinion it is desirable to do so, before considering the application, make an interim order to the kind applied for and such order shall be expressed to have effect pending the determination of the application.

(3) The court may, before making an order under subsection (1), direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

(4) Where an application is made to the court for an order under paragraph (1)(J), the court may grant the order -

(a) where the court is satisfied that the person has refused or failed to do the required act or thing, whether or not it appears to the court that the person intends to again refuse or fail, or continue to refuse or fail, to do the required act or thing; or

(b) where it appears to the court that in the event that such an order is not granted, it is likely that the person will refuse or fail to do the required act or thing, whether or not the person has previously refused or failed to do the act or thing and whether or not there is any imminent risk of damage to any person if the person required to do such act or thing refuses or fails to do so.

(5) Where an application for an order under subsection (1) is made by the Commission or any person duly authorized by the Commission or a stock exchange, a futures exchange or an approved clearing house, the court shall not, as a condition of the grant of the order, require any undertaking as to damages to be given by or on behalf of the Commission, stock exchange, futures exchange or an approved clearing house.

(6) A person appointed by order of the court under subsection (1) as a receiver of the property of a holder of a Capital Markets Services Licence -

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(a) may require the holder to deliver to the receiver any property of which he has been appointed receiver or to give to the receiver all information concerning that property that may reasonably be required;

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(b) may acquire and take possession of any property of which he has been appointed receiver;

(c) may deal with any property that he has acquired or of which he has taken possession in any manner in which the holder might lawfully have dealt with the property; and

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(d) has such other powers in respect of the property as the court specifies in the order.

(7) In paragraph (1)(H) and subsection (6), "property", in relation to a holder of a Capital Markets Services Licence includes monies, securities, or other property and documents of title to securities or other property entrusted to or received on behalf of any other person by the holder of a Capital Markets Services Licence or another person in the course of or in connection with the business of the holder.

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(8) The Commission or a trustee appointed by an order of the court under paragraph (1)(I) -

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(a) may require any person to deliver to the Commission or trustee any securities or such other property specified in the order or to give to the Commission or trustee all information concerning the securities or futures contracts that may reasonably be required;

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(b) may acquire and take possession of the securities or such other property;

(c) may deal with the securities or such other property in any manner as it thinks fit; and

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(d) shall have such other powers in respect of the securities or such other property as may be specified by the court in the order.

(9) The proceeds of the dealing in or disposal of securities or futures contracts under paragraph (1)(I) shall be paid into the court, an any person claiming to be beneficially entitled to the whole or any part of such proceeds may, within thirty days of such payment into the court, apply to the court for payment out of the proceeds to him.

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(10) A person who contravenes - A

(a) an order under subsection 91) that is applicable to him;

(b) a requirement of a receiver appointed by order of the curt under subsection (1); or B

(c) a requirement of the Commission or trustee appointed by order of the court under paragraph (1)(I),

commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to C imprisonment for a term not exceeding ten years or to both.

(11) Subsection (10) does not affect the powers of the court in relation to the punishment of contempt of court. D

(12) The court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

(13) For the purpose of this section, "relevant requirement" - E

(a) in relation to an application by the Commission under this section, means a requirement -

(i) which is imposed by or under this Act or any securities laws; F

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;

(iii) which is imposed by or under the rules of a stock exchange, futures exchange or an approved clearing G house; or

(iv) which is imposed by or under any other law and the contravention of which constitutes an offence which the Commission has the power to prosecute with H the consent in writing of the Public Prosecutor;

(b) in relation to an application by the exchange holding company, a stock exchange, a futures exchange or an approved clearing house, means a requirement which is imposed by or under the rules of the stock I exchange, the futures exchange or approved clearing house, as the case may be; and

A (c) in relation to an application by the aggrieved person, means a requirement -

(i) which is imposed by or under this Act;

(ii) which is imposed as a condition or restriction of any
B approval or licence that is given or issued under or pursuant to this Act or any securities laws; or

(iii) which is imposed by or under the rules of stock exchange, a futures exchange or an approved clearing house.

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(14) An application made pursuant to this section shall not prejudice any other action that may be taken by the Commission, exchange holding company, stock exchange, futures exchange, approved clearing house or aggrieved
D person, as the case may be, under any securities laws or any other law or rules.

[40] First thing to observe about the application under s. 360 CMSA is that the plaintiff may make the application for the various orders as a pre-emptive action as well as an affirmative
E action. This is obvious from s. 360(1)(a)(i) CMSA where the plaintiff may apply to court if there is reasonable likelihood that any person will contravene a relevant requirement; and in s. 360(1)(a)(ii) and (iii) where an application can be made for an order or orders against person who has contravened a relevant
F requirement. The expression 'relevant requirement' is defined in s. 360(13) CMSA; and this include under subsection (13)(a)(i) a requirement imposed by CMSA or any securities law.

[41] In this instant case the plaintiff, having satisfied itself that
G the defendant has or could have contravened the relevant requirement under the CMSA, in particular s. 177 and 188, has filed the originating summons application in encl. 1 seeking certain declaratory orders as well as injunction against the defendant. The application was made pursuant to subsection (1) of s. 360. Having
H regards to the nature of the alleged contravention of the relevant requirement by the defendant, one of the orders sought by the plaintiff in the originating summons application is a restraining order under para. (D) of s. 360(1) CMSA. The paragraph reads:

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> An order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the Court is satisfied such person is reasonably likely to dispose of or otherwise deal with;

[42] At the same time, and while pending the disposal of the originating summons application in encl. 1 the plaintiff also filed *ex parte* application in encl. 3 for an interim restraining order. This is permissible under subsection (2) of s. 360 CMSA and the subsection reads:

> if an application is made to a court for an order under subsection (1), the Court may, if in its opinion it is desirable to do so, before considering the application, make an interim order of the kind applied for and such order shall be expressed to have effect pending the determination of the application.

[43] It is to be noted that under subsection (2) above, the order that the court could make is interim in nature and pending the determination of the main application under subsection (1) of s. 360.

[44] Thus in respect of the defendant's contention that the interim order made by this court on 16 June 2010 (in encl. 5) is defective and there should be set aside because it contains no express words that 'the order shall have effect pending the determination of the originating summons application in encl. 1' or of express words to that effect is unsustainable. In my view the absence of such words or expressions in the order are not fatal or invalidate the order. It is obvious from the language used in subsection (2) of s. 360 CMSA that an application made under that subsection is for, and the only order to be made on such application is, an interim order. And the application and order under subsection (2) can only be considered by the court only when the applicant has filed an application under subsection (1) of s. 360 of the CMSA. Therefore, in my opinion, the inclusion of the words or expressions that the interim order 'shall have effect pending the determination of the application' is not mandatory.

[45] It is a cardinal principle of interpretation that courts shall give effect to the intention of the legislature. In this regards, reference to s. 17A of the Interpretation Acts 1948 and 1967 which prefers a construction that would promote the purpose or object underlying the Act to a construction that would not promote that purpose or object would be helpful. On this principle

it is my view that taken subsection (1) and (2) together it is obvious that the purpose of the section as intended by the legislature is to enable the plaintiff as the regulating body to apply to court for the necessary orders under subsection (1) in order to arrest any contravention of the securities laws; and pending the final disposal of such application, to apply for an interim order for the purpose of preservation of assets or proceeds obtained or avoided by the contravention.

[46] It is true that the words 'such order shall be expressed to have effect' are used in subsection (2) of s. 360 CMSA. However, there are authorities that have decided that not in every case when the word 'shall' is used it must mean mandatory. It all depends on the scope and object of the statute. One of such authorities is the case of *DW Margaret David Wilson v. Perbadanan Kemajuan Kraftangan Malaysia* [2010] 5 CLJ 921 CA. The case is about interpretation of s. 35 of Perbadanan Kemajuan Kraftangan Malaysia Act 1979 that provides for the right to institute proceedings and the right of representation. The Court of Appeal in that case, on hearing the appeal from the High Court, held that the section which uses the word 'may' is mandatory. However on further appeal to the Federal Court, the apex court held that the section is only an enabling section. But what is important to note that in coming to that conclusion the Federal Court did not disapprove the observation by the Court of Appeal that "[T]he question whether the legislative intends s. 35 of the Act to be mandatory or directory must depend upon the scope and object of the Act".

[47] It is also my view that in this instant the defendant is not prejudiced by the absence of those words or expressions. The plaintiff in its *ex parte* application in encl. 2 made it very clear that the order sought is an interim order under subsection (2) of s. 360 CMSA.

[48] The next argument to consider is the submissions by Mr. Tan Hock Chuan learned counsel for the defendant that O. 29 RHC 1980 applies in this case and there has been non compliance of it by the plaintiff in its application in encl. 2. To support his argument Mr. Tan cited the case of *Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483; [1996] 2 MLJ 605 where the Court of Appeal held in Held (1) of the head notes that O. 29 r. 1(2A) was introduced to ensure that *ex parte*

injunctions of any sort were granted only in cases where they were truly called for; and that to ensure the policy behind the introduction of r. 2A is not defeated, High courts must demand strict compliance with its terms. I must say that view is a correct statement of the law in so far as it concern an application for a Mareva injunction, which is the case in *Motor Sports International Ltd (supra)*. This is because of the incalculable harm and damage that may be caused to a defendant by the grant of such order.

[49] However it was argued by Mr. Tommy Thomas for the plaintiff that the plaintiff's application in encl. 2 is not for a Mareva injunction but for a restraining order under an express statutory provision which is subsection (2) of s. 360 of the CMSA. Therefore, he says O. 29 RHC 1980 has no application. He further argued that O. 29 RHC 1980 applies only when a party is seeking a common law remedy in injunctive relief such as for a Mareva or Antor Pillar order.

[50] However, learned counsel for the defendant argued that the order sought by the plaintiff in encl. 2 is a restraining order in the nature of an injunction. Therefore the application must comply with the requirements of O. 29 RHC 1980 and in particular with r. 1(2A). Learned counsel for the defendant relies on *Dato' Mohamed Hashim Shamsuddin v. The Attorney-General, Hong Kong* [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 SC as his authority for the proposition. However, in my view reliance on that case is of no assistance to the defendant. That case is about a request by the Attorney General of Hong Kong, in relation to criminal proceedings in Hong Kong, for evidence taken before the High Court in Malaysia be allowed to be used in that criminal proceedings. The request was made by letter and allowed by an *ex parte* order under O. 66 r. 1 RHC 1980. The appellant then appealed to set aside the *ex parte* order. The main argument in that case is that under O. 1 r. 2(2) and (3) and O. 66 RHC 1980 the High Court has no jurisdiction to make an order in relation to criminal proceedings and that there was no statutory source or enabling provision to empower the court to order evidence to be recorded for the purpose of criminal proceedings in a foreign court. In that case, in Held [1](b) the majority of the Supreme Court then held that "Order 1 r. 2(2) of RHC in specifically providing an exception to the provisions of para. (2) of that rule categorically permits the application of the RHC or any provisions thereof in relation to the proceedings specified in r. 2(2)"; and dismissed the appeal.

[51] However, it is to be observed that the Supreme Court then was speaking of application under the RHC 1980. In our case the application is made pursuant to a statutory provision under s. 360(2) CMSA. In this respect, it is interesting to note that the observation of Edward George Seah SCJ, who delivered a dissenting judgment in that case, though the RHC 1980 themselves have the force of statute, being a subsidiary legislation made pursuant to s. 17 of the Courts of Judicature Act 1964, that force of statue only confines to matters of procedure only; and cannot confer any new jurisdiction when non existed before or enlarge the jurisdiction, or create or alter substantive rights – see p. 95 paras. (f) to (i) of the judgment. It is therefore my view that that case is not an authority for the proposition suggested by learned counsel for the defendant.

[52] All the authorities cited by the defendant on this point are about Mareva injunction. This is a common law remedy or relief and does not depend on any particular provision of statute. The case before me is different in this respect. Here there is a clear provision of the law that entitles the plaintiff to apply for an interim order for the purpose of preservation of property or *status quo* pending final determination of an application proper under subsection (1) of s. 360 CMSA. In the circumstances, I am inclined to agree with the submissions by the learned counsel for the plaintiff that O. 29 RHC 1980 does not apply in application for an interim order under s. 360(2) CMSA, *albeit* the application is by way of *ex parte*. I would also go as far as saying that the *ex parte* application under that provision should only be made or allowed in most urgent of cases. In all other cases, the application should be *inter partes*. I am of that view after having regard to the provision of subsection (3) of s. 360 CMSA which provides as follows:

> The court may, before making an order under subsection (1), direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

[53] Thus, it appears that under the subsection the legislature has, in its wisdom, provides for the handling of *ex parte* application under subsection (2) of s. 360 CMSA. For that reason too, I think O. 29 RHC 1980 does not apply in this case.

[54] It was also argued that the plaintiff failed to set out a clear and concise statement of the facts relied on to justify the application for the *ex parte* injunction. It was submitted that the plaintiff failed to set out any answer asserted by the defendant or thought likely to assert either to the claim in the originating summons or the claim for interlocutory relief. It is a fact that the plaintiff only filed an affidavit in support of the originating summons; there is no affidavit filed in support of the *ex parte* application. The plaintiff must have relied on the same affidavit for its *ex parte* injunction application in encl. 2. It was further submitted that the plaintiff failed to set out whether any previous similar *ex parte* application has been made to any other judge, and if so, the order made in that previous application.

[55] The non-filing of affidavit in support of the *ex parte* application by the plaintiff in my view does not vitiate the application or renders it defective. The relief sought in the *ex parte* application is one of the same reliefs prayed for in the originating summons. Therefore, in my view the plaintiff may rely on the affidavit in support of the originating summons to argue a case for the *ex parte* order. There is no prejudice to the defendant since the affidavit filed in the originating summons application has detailed the grounds on which the application is sought.

[56] With regard to the defendant's argument that the plaintiff has not shown any evidence in the affidavit that there is a real risk of dissipation of assets by the defendant, again I think this argument is misconceived. As I have said earlier the application herein is not a Mareva application where that principle applies. Thus the cases of *European Grain & Shipping Ltd v. Compania Naviera Euro-Asia SA & Ors* [1989] 1 LNS 157 and *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 cited by the defendant are not relevant. Those are cases dealing with Mareva application.

[57] In my view, the plaintiff has no obligation to show evidence of a real risk of dissipation of assets in application under s. 360 CMSA. The application is not for the purpose of preservation of the assets for personal benefit of the applicant, the plaintiff. The application was for the preservation the assets that are allegedly obtained in contravention of the provisions of the securities laws and if necessary for restitution to innocent party. The application is made more on the basis of public interest to stop the wrongdoer

benefitting from the wrongs committed. It is my view that to succeed in an application under subsection (2) of s. 360 CMSA, all the plaintiff has to show is that there has been a contravention of the securities law and the person who contravened it ie the defendant has made unjustified gains from it.

[58] With regard to the argument by the defendant that there is no credible evidence of contravention of s. 177 and s. 188 CMSA, I am of the view that there are evidence in the affidavit to suggest so. In this case the plaintiff has deposed in Rizal's affidavit that the defendant had made or disseminated false or misleading information within the meaning of s. 177 CMSA and has stated its belief that the defendant was engaged in insider trading activities within the meaning of s. 188 CMSA in relation to the trading in Kenmark's shares. The fact that the shares were acquired by the defendant either directly through a company controlled by him or indirectly through his family trust fund is not dispute. Also not in dispute is that the defendant has made the purportedly misleading and false statements. It is also incontrovertible fact that the defendant had disposed all the Kenmark's shares acquired by him for a hefty profit within a few days after the acquisition and after he had made the alleged statements. At this juncture of an *ex parte* application the court is not concerned with merits of the plaintiff's allegation of facts. The court needs only to be satisfied that on the evidence in the affidavit filed in this case there is *prima facie* case for the *ex parte* order to be made. And in this case I am satisfied that is so.

[59] Finally in my view the CMSA, and in particular s. 360 (and seen in the light of the functions to be carried by the plaintiff), is drafted with the intention, among others, of protecting the investing public from unscrupulous market players and to ensure that improper gains or avoidance from any trading in securities that contravenes the securities law and the Stock Exchange Rules are accounted for. This is to ensure public confidence and integrity in the securities in duty. Under s. 360 CMSA, the plaintiff as the regulating body of the securities industry is given express authority to come to court and seeks variety of orders to ensure compliance with the relevant requirement of the securities laws and to prevent contravention at the expense of unsuspecting investing public. In this case the plaintiff allegations were grounded on gains gotten through the use of misleading information on corporate operations

of a company and the use of insider information on the shares of the company, which in the plaintiff's belief is in contravention of the securities laws requirements.

[60] For the above reasons, I shall dismiss encl. 7 and affirm the *ex parte* order granted on 16 September 2010 with a slight variation; and that is in respect of the order that directs the defendant to file affidavit of means within four days of the date of the order. By agreement of the parties, compliance with this part of the order has been stayed pending this *inter parties* hearing and further direction of the court. In this respect, and after hearing the explanation by Mr. Tommy Thomas for the plaintiff on the need to file such affidavit, I am of the view that the requirement for such affidavit is premature. In any case, the defendant has indicated that he is ever willing and ready to provide a security to the plaintiff to secure the payment of the amount sought by the plaintiff under the CMSA in the event the plaintiff succeeds in its main application. Therefore I shall order that this part of the *ex parte* order, that is the filing of affidavit of means, be discharged.

[61] Order accordingly.